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SUPREME COURT OF THE UNITED STATES

No. 590

HARRIS KENNEDY, ET AL,

Petitioners

versus

SILAS MASON COMPANY,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Harris Kennedy, Howard Sweatt, L. M. Williams, William S. Jones, Harry Johnson and James E. Fitch, praying for writ of certiorari, respectfully show:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioners (not firemen) sued for overtime, penalties, and attorneys' fees, said to be due them under the

Fair Labor Standards Act of June 25, 1938 (c-676, 52 Stat. 1060, 29 U.S.C.A. 201), by the Silas Mason Company, a "cost-plus-a-fixed-fee" contractor with the United States Government. The Silas Mason Company firstly constructed an ordnance plant for the Government, after which it operated this facility for the Government under the conventional wartime "cost-plus-a-fixed-fee" contract, and it was during the operation of this facility, in making munitions for war, that petitioners worked.

A motion for summary judgment was filed by the Silas Mason Company (R-19), setting out that the plant belonged to the Government, the title to the raw materials processed into munitions was at all times in the Government, and that Silas Mason Company shipped out these munitions upon orders of the Government, for the prosecution of the war by the Government and its allies. The contract with the Government was attached, from which it was apparent that this was the standardized wartime "cost-plus-a-fixed-fee" contract. At this plant, petitioners engaged in the manufacture, fabrication, and loading of shells, munitions, bombs and other materials and products, which were shipped out of the state of Louisiana during the conduct of the war (R-2, 21). Petitioners' work related to the manufacture of these munitions (R-3, 21). The plant and equipment used in the products, activities, as well as goods worked on, were the property of the United States (R-21); and the contract, pursuant to which the Silas Mason Company constructed and operated the plant, refers to the Silas Mason Company as a contractor and

provides that the contractor is the manufacturer of, or a regular dealer in, the materials, supplies, articles or equipment to be used or manufactured, in the performance of the contract (R-48). The contract provides that petitioners and other employees "shall be subject to the control and constitute employees of contractor." (R-45, 113). The contractor was to receive specified fees from the contract in addition to reimbursement for costs (R-21), but the contract provided for renegotiation of these fees "to eliminate therefrom any amount found as a result of such renegotiation to represent excessive profits" (R-128-c). The contract contemplated compliance by the Silas Mason Company with various federal and state regulatory statutes applicable to private employers, such as complying, in appropriate situations, with the Eight Hour Law (R-38, 39, 40, 41, 43) and with the Walsh-Healey Act (R-47, 51, 116). Compliance with the Social Security Act was required because included among the reimbursable costs (R-54). The Silas Mason Company was required to adhere to local Workmen's Compensation Laws and to "procure all necessary permits and licenses, obey and abide by all applicable laws, regulations and ordinances and other rules of the United States of America, of the state, territory or subdivision thereof wherein the work is done, or of any other duly constituted public authority" (R-75). The Silas Mason Company bought the raw materials in the open market, but under the contract (R-73) it was stipulated that title vested in the Government from the moment of acquisition by the Silas Mason Company.

The district judge granted the motion for summary judgment upon the theory that the munitions worked on by the petitioners for transportation outside the state of Louisiana did not constitute interstate commerce, within the meaning of the Fair Labor Standards Act, because the goods were the property of the United States during their manufacture and interstate transportation (R. 232, 239).

The Fifth Circuit Court of Appeals affirmed by an en banc court, Judge Hutcheson dissenting. Besides agreeing with the district judge that the petitioners were not engaged in the production of goods for commerce, the Fifth Circuit Court of Appeals additionally held that the Silas Mason Company was not an *independent contractor*, because the Government exercised a continuing supervision over the manufacture of the munitions. (R. 251)

Additionally, the Fifth Circuit Court of Appeals held that this contract between the Silas Mason Company and the Government, being under the authority of Act of Congress of July 2, 1940 (Public No. 703, 54 Stat. 712, entitled "An Act to Expedite the Strengthening of National Defense"), petitioners were therefore *actually employees of the War Department.*

It was also held, by the Fifth Circuit Court of Appeals, that the United States would be exempt in the situation presented here, under sub-paragraph "i" of Section 3 of the Fair Labor Standards Act, which exempts from the operation of the Act "goods after their delivery into the actual physical possession of the ultimate consumer there-

of, other than the producer, manufacturer, or processor thereof".

A rehearing was timely filed but same was refused, without written opinion, Judge Hutcheson again dissenting (R-262).

JURISDICTION.

The original judgment of the Fifth Circuit Court of Appeals was entered December 12, 1947 (R-251); the per curiam refusing rehearing was rendered on January 15, 1948 (R-269).

The jurisdiction of this Court is invoked under Section 240-a of the Judicial Code as amended by Act of February 13, 1925 (Title 28, U.S.C.A. 347).

QUESTIONS PRESENTED.

The questions presented are:

1. Whether munitions produced in a Government facility by a "cost-plus-a-fixed-fee" contractor with the Government, for shipment out of the United States, for use by the Government and its allies in the prosecution of the late war, are "commerce" within the meaning of the Fair Labor Standards Act.

2. Whether munitions of war, produced in a facility belonging to the Government, by a "cost-plus-a-fixed-fee" contractor, from raw materials, title to which was always in the Government, were goods within the "ultimate consumer" provisions of sub-paragraph "i" of Section 3 of the Fair Labor Standards Act.

3. Subsidiary to the question immediately above is whether or not the *merely constructive* possession which the Government had of these raw materials, as they were being processed, was a sufficient compliance with the "actual physical possession" requirement of the ultimate consumer provision to create the exemption.

4. Whether, under the circumstances presented here, petitioners were actually employees of the War Department of the United States and thus entitled to such benefits as related to overtime provided by the Act of July 2, 1940 (Public No. 703, 54 Stat. 712, 5 U.S.C.A. 189-a).

5. And the question, subsidiary to the question immediately above, whether petitioners were laborers and mechanics, within the meaning of the Act of July 2, 1940 (Public No. 703, 54 Stat. 712, 5 U.S.C.A., 189-a).

6. Whether or not the Silas Mason Company, under the circumstances presented here, was an independent contractor, or merely an agency of the United States.

7. The Court, in resolving against the presence of "commerce", looked to the ultimate purpose of, or the end use of, the munitions; and finding that to be "war", and that "war" and "commerce" are not synonymous, it decided against the presence of "commerce". A question presented is whether a test permitted by the Act is the ultimate use or purpose of the product manufactured.

REASONS FOR GRANTING WRIT.

Petitioners assign as reasons for the issuance of a writ of certiorari the following:

1. The issues presented are of outstanding public importance, due to the fact that much government material was produced during the war by "cost-plus-a-fixed-fee" contractors, under identical or similar conditions; and, as a result thereof, there are scores of cases involving hundreds, if not thousands, of litigants, presenting the problems here; and it is of prime importance that the issues be clarified by an authoritative decision of this Court.

2. The decision rendered herein by the Fifth Circuit is contrary to the decision of the Seventh Circuit, in the case of *Bell v. Porter, 159 F. 2d 117*, where the Court specifically held that munitions produced under like circumstances were commerce, within the meaning of the Fair Labor Standards Act.

3. The decision below is in conflict with relevant decisions of this Court, in its holding that a "cost-plus-a-fixed-fee" contractor, engaged in the production of munitions, was a mere agency of the United States Government, conflicting with the decisions of this Court in the cases of *Alabama v. King and Boozer, 310 U. S. 1; Buckstaff Company v. McKinley, 308 U. S. 358; Curry v. U.S., 314 U. S. 14; Penn Dairies v. Milk Control Commission, 318 U. S. 361.*

4. The Fifth Circuit has held that this "cost-plus-a-fixed-fee" contract, similar to all others entered in-

to by the Government during the war, was not governed quoad the workers by the provisions of the Wage & Hour Law, but, to the contrary, by the Act of Congress of July 2, 1940 (Public No. 703, 54 Stat. 712, 5 U.S.C.A., 189-a), holding, in effect, that these employees were employees of the War Department of the United States. This is the first time any court has said this. Thus there is presented the important issue as to whether war workers, under a "cost-plus-a-fixed-fee" contractor, are entitled to the benefits of the Wage & Hour Law.

WHEREFORE, your petitioners respectfully pray that a writ of certicrari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case No. 11,976, entitled on its docket "*Harris Kennedy, et al, Appellants, versus Silas Mason Company, Appellee*", and that said judgment of the said Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and for such other relief as the Court may deem proper.

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MEMORANDUM BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERITORARI.

May it please the Court:

The decision of the Circuit Court of Appeals has not been reported but begins at page 251 of the record. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (Title 28, U.S.C.A., 347).

A statement of the case is found at pages 1 to 5 of the foregoing application.

ASSIGNMENT OF ERRORS

1. The Court below erred in finding that commerce was not involved in this case within the meaning of the Fair Labor Standards Act Law;

2. The Court erred in its conclusion that the munitions of war involved herein were not "goods" within sub-paragraph "i" of Section 3 of the Fair Labor Standards Act;

3. The Court erred in concluding that the employees of a "cost-plus-a-fixed-fee" contractor producing munitions for the United States Government, were not covered by the Fair Labor Standard Act but by provisions of Act of July 2, 1940, (Public 703, 54 Stat. 712, 5 U.S.C.A. 189a;

4. The Court erred in its conclusion that Silas Mason Company, respondent, was a mere agency of the Government of the United States;

5. The Court erred in looking to the end use or ultimate purpose of the goods produced as a test under the Fair Labor Standards Act, no such definition being set out or implied in the act;

6. The Court erred in concluding that merely commercial transactions were within the ambit of the Act.

ARGUMENT.

1.

The public importance of the issues presented by this application can scarcely be overstated. During the last war the government expended forty billion dollars of its total war effort to obtain war supplies through the medium of "cost-plus-a-fixed-fee" contracts similar to tha in this case (see report of the Judiciary Committee in connection with the Portal to Portal Act of 1947). Out of that immense business have arisen multitudes of claims like the one asserted here, and the lower federal courts are now busily engaged in the disposition of them. These cases are being variously decided in the United States District Courts and in the state courts. This Court has had to deal with cases arising out of similar circumstances as manifested in the case of *Armour & Co. v. Wantock, 323 U. S. 126*, and the case of *Skidmore v. Swift & Co., 323 U. S. 134*. Among the cases involving similar issues that are, or have been, in the United States District Courts and the state courts, we refer to:

Umthun v. Day & Zimmerman, Inc., 16 N.W. (2d) 258.

Timberlake v. Day & Zimmerman, Inc., 49 F. Supp. 28.

Lasater v. Hercules Powder Co., 7 W.H. Cases 150.

Adams v. St. Johns River Shipbuilding Co., 69 F. Supp. 989.

Barksdale v. Ford, Baker & Davis, 70 F. Supp. 690.

Deal & Co. v. Leonard, 196 S.W. (2d) 991.

Steward v. Kaiser Co., 71 F. Supp. 551.

Anderson v. Federal Cartridge Corp., 7 W.H. Cases 1.

Matlock v. Sanderson & Porter, 6 Wage Hour Report 917.

Crabb v. Welden Bros., 65 F. Supp. 369.

This is simply illustrative. The issues thus raised here are alive—current, and a decision by this Court would be most useful in the administration of the law.

2.

The United States Circuit Court of Appeals for the Seventh Circuit, in the case of *Bell v. Porter, 159 F. (2d) 117*, did squarely reach a position on the issue of "commerce" directly contrary to the position reached by

the Fifth Circuit in this case. It therefore seems that a writ should be granted herein in order to resolve this conflict between the circuits. We observe, of course, that this Court, after granting a writ of certiorari in the *Bell v. Porter* case, did later reverse its position and recall the writs without a hearing (67 S. Ct. 1092). But we note that in this case, while the circuit court found with complainants on the issue of "commerce", it found against them on the merits, holding that sleeping time of firemen was not work time within the meaning of the Wage & Hour Law (petitioners were not firemen). We have no way of knowing whether that or other reasons actuated this Court in recalling the writs without a hearing, but we make bold to suggest, as illustrative of the need of clarifying this law, that if *Bell v. Porter* had been taken and decided, this application and others, doubtless being made and to follow, would be unnecessary.

3.

Moreover, the contract with Silas Mason Company here was typical (see opinion of the District Judge in this case, R-222) of the multitude of other "cost-plus-a-fixed-fee" contracts entered into by the government, aspects of which this Court has considered. While not precisely presenting the same issues, the decision below is apparently contrary to the ruling of this Court that "cost-plus-a-fixed-fee" contractors are not agents or instrumentalities of the United States, particularly the following cases:

Alabama v. King and Boozer, 310 U.S. 1.

Buckstaff Co. v. McKinley, 308 U.S. 358.

Curry v. U.S., 314 U.S. 14.

Penn Dairies v. Milk Control Commission, 318 U.S. 361.

4.

The decision of the court that the controlling law was the Act of July 2, 1940 (Public No. 703, 54 Statutes 712, 5 U.S.C.A. 189-a, entitled "An Act to Expedite the Strengthening of National Defense") was an extremely important ruling, the effect being that the Wage & Hour Law of 1938 was superceded and set aside as to employees of the "cost-plus-a-fixed-fee" contractor for the government. This is the first time this view has been projected by any court. It presents an important problem connected with interpretation of the Wage & Hour Law. If, indeed, on this point the Fifth Circuit is correct, it would be dispositive of the great mass of cases with identical issues now moving through the federal courts.

This Act of July 2, 1940 provides, in Section 4 thereof, only for "laborers and mechanics". Petitioners are described as being either safety inspectors or foremen, not in the category of laborers and mechanics.

Swisher v. U.S., 57 Cl. 123.

Gordon v. U.S., (1896) 31 Ct. Cl. 254; (1908) 26 Op. Att. Gen. 404.

Sim v. State, 254 N.Y.S. 150, 151; 142 Misc. 159.

Finerty v. Bryan, Ind., 16 N.E. (2d) 882, 883.

If not within the category of laborers and mechanics, was this Act of July 2, 1940 a mere pro tanto repeal of the Wage & Hour Law, or did it make the Wage & Hour Law completely unavailable in the situation we have here? Those are issues that only this Court can resolve with such finality as to set litigation at rest.

5.

Finally, the Court of Appeals took the view that, as these munitions were made for war, which might be the very antithesis of commerce, there was no commerce within the meaning of the Wage & Hour Law. In that connection the Fifth Circuit set up and invented a wholly arbitrary standard not supplied by the Act. Implicit in that decision is the notion that to be commerce the product manufactured must be for "trade and traffic", and that alone. The definition in the Wage & Hour Law is much broader. The narrow conception of commerce as being confined to trade and traffic has, in other situations, been rejected by this Court, e.g. *Caminetti v. U.S., 242 U.S. 470; 37 S. Ct. 192* (women for immoral purposes); *Champion v. Ames, 188 U.S. 321 23 S. Ct. 321* (lottery tickets); *Reid v. Colorado, 187 U.S. 137; 23 S. Ct. 92* (diseased stock); *United States v. Hill, 248 U.S. 420; 39 S. Ct. 143* (intoxicating liquors); *Brooks v U.S., 267 U.S. 432; 45*

S. Ct. 345 (stolen automobiles); *Gooch v. U.S., 297 U.S. 124; 56 S. Ct. 395* (kidnapped persons). There is nothing in the history of the Wage & Hour Law, nor in the Act itself, that suggests that only commercial transactions are within the ambit of the Act.

WHEREFORE, petitioners respectfully pray that certiorari be granted.

Respectfully submitted,

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